No. 10990.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHAN NEWMAN, W. O. FILES and BURT CAIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT.

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Statement of the Case.

The indictment in this case was filed in the Southern Division of the United States District Court for the Northern District of California, on December 20, 1944. It named as defendants Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, Primo Rocco, and Burt Cain. They were charged with a violation of Section 88 of Title 18 U. S. C. "(Conspiracy to violate Title 50 U. S. Code, Appendix, Sections 904a-925)."

The case was tried before the court, sitting without a jury. The defendants Primo Rocco and Charles Malaby were used as witnesses by the prosecution [P. R. 179, 183], but they were not dismissed as defendants. The testimony

given by these two witnesses is of such nature that it cannot be doubted it contributed very largely to the conviction of the defendants.

Charles Malaby pleaded guilty and was later sentenced. The defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, and Burt Cain were adjudged guilty as charged in the indictment [P. R. 14]. Nathan Newman and Burt Cain were each sentenced to one year and one day and to pay a fine of $10,000.00, and as to them the court recommended commitment to a United States penitentiary; the defendants W. O. Files, R. H. Shaffer and Oscar R. Lowenthal were each sentenced to imprisonment for a period of nine months and to pay a fine of $5,000.00, and as to them the court recommended commitment to a jail type institution. The defendants Shaffer and Lowenthal did not appeal but entered upon the service of their sentences.

From the judgments pronounced as aforesaid, this appeal is prosecuted.

Notices of appeal on behalf of appellants W. O. Files [P. R. 27], Nathan Newman [P. R. 28], Burt Cain [P. R. 30] were filed on February 3, 1945. Joint Assignment of Errors were served and filed and a copy thereof appears on pages 51-54 of the Printed Record.

It is not proposed to urge the errors assigned *seriatim,* but they will be aggregated hereinafter for the purpose of discussions of points involved.

Statement of Facts.

The indictment is short [P. R. 2-4] and declares

> "That Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, Primo Rocco, Burt Cain (hereinafter called said defendants), at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code, Appendix, Sections 904a-925, by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, to-wit, distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a), and that thereafter and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:"

Then, follows a series of alleged overt acts.

Brief Statement of the Questions Involved.

Briefly stated, the questions involved in this appeal, may be resolved into three points; *viz.*:

Point One: Insufficiency of the Indictment.

Point Two: The Improper Admission of Evidence.

Point Three: Error of the Court in Refusing to Acquit the Defendants upon Their Motions Made at the Close of the Government's Case in Chief, and Also Made at the Close of the Entire Case.

The evidence disclosed that Mr. Cain began the doing of business under the fictitious firm name and style of International Import Company. At the time of the trial he had been in the wholesale liquor business and in the business of importing liquors from Mexico for a year or a year and a half. His headquarters were in Los Angeles County, but he also operated in other parts of California. The evidence showed that Mr. Cain first met Malaby, Nathan Newman and Morris Newman (the latter was not indited or tried) about March, 1944 [P. R. 271]. Nathan Newman was appointed sales manager of the International Import Company and Malaby was appointed a salesman on commission.

Later, International Import Company secured a franchise [U. S. Exhibit 23, P. R. 259] for the sale of whiskey from the Mid-Valley Distributing Corporation, and ordered a car of whiskey from that company. This was purchased by Mr. Cain, doing business as International Import Company, as a wholesaler and distributor through

the regular channels of retail trade [P. R. 271]. On March 6, 1944, International Import Company secured from the Federal Government and from California a basic permit and a Wholesale and Importer's License [P. R. 271].

After Malaby had been employed as a salesman on commission and without any authority from or consultation with Mr. Cain, Malaby employed Lowenthal as a salesman. Prima Rocco came into the picture through the efforts of one Burnett, who had been employed by Malaby to solicit orders for the purchase of whiskey. Mr. Rocco made several calls upon various persons who bought whiskey, and at one time he testified that he collected certain money which he turned "over to Burnett and Malaby together" [P. R. 182]. Of the defendants, Rocco dealt only with and knew no one other than Malaby [P. R. 170].

At the time of the transactions complained of, Mr. Files was, and for a long time prior thereto had been, engaged in the real estate and insurance business in San Francisco, having an office on Kearney Street. He was asserted by the prosecution to have been in the conspiracy as the escrow holder of certain moneys deposited by purchasers of liquor, and the evidence of certain of the witnesses indicated that he did so act as escrow holder and in some instances gave receipts for money deposited in escrow for liquor. The defendant Shaffer had an office with Mr. Files and in one or two instances, hereafter discussed, was present when certain money was deposited in escrow with Mr. Files.

The evidence showed that some of the defendants, particularly Mr. Malaby, solicited orders for whiskey from many of the witnesses who were engaged in the liquor business, or in the conduct of cocktail bars and restaurants; that orders were taken from those persons by Mr. Malaby upon the forms of contract furnished to Malaby by International Import Company. These orders were taken at "over-the-ceiling prices," which excess price was paid in cash to Malaby, in most instances. The orders were written up for the whiskey on the basis of the ceiling price.

In every instance the person who paid, or contracted to pay, over-the-ceiling prices for the whiskey, knew that he was paying in excess of the prices fixed by the OPA, and in most of the instances those witnesses testified that they knew they were committing a crime in buying the whiskey at over-the-ceiling prices.

After many orders had been received, the carload of whiskey ordered by the International Import Company from the Mid-Valley Distributing Corporation arrived in California, and deliveries were made to the various purchasers of liquor. A short time thereafter the liquor was seized or condemned by the Food and Drug Department of the State of California as being below standard. Most of the liquor was picked up in the different bars, cafes and cocktail lounges where it has been distributed. The complaints made by the purchasers of liquor to Governmental agencies was the single moving cause in bringing about the indictment, but it was not contended during the trial, nor is it now contended that any of these defendants knew the liquor was substandard, or liable to seizure because of its poor quality.

POINT ONE.

Insufficiency of the Indictment.

Under this heading we proposed to discuss the Assignment of Errors I to VI, inclusive [P. R. 51-54] and XVI [P. R. 71] reading as follows:

"I.

Said District Court erred in denying their Demurrers to the indictment herein upon each and all of the grounds set out in said Demurrers, and requiring them to plead to the said indictment.

II.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman, W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment.

III.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss the said indictment, and to acquit them on each of the charges in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, and would not and does not tend to prove that the said Nathan Newman, W. O.

Files and Burt Cain are guilty in any manner or form as charged in said indictment.

IV.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Nathan Newman, W. O. Files and Burt Cain, in that the matters and things alleged in said indictment do not constitute an offense against the laws of the United States.

V.

The District Court erred in denying the motions made by the said defendants after the Court had found the defendants guilty in the above entitled cause, for an order arresting the judgment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, or against the constitution of the United States, and particularly said indictment does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VI.

Said District Court erred in Overruling the objections of the said defendants to the admission of any evidence on this indictment, and admitting in evidence the testimony of the plaintiff's witnesses in support of the charges set out in said indictment. The grounds of the objections and the exceptions were as follows:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not

state an offense. I can state it very briefly to your Honor. I know the matter was raised by demurrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense.
* * *

The Court: For the purpose of record, it will be denied.

Mr. Cannon: Exception. [14, 16]"

"XVI.

* * * * * * * *

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged.

* * * * * * * *

The Court: —it is clearly the duty of the Court to deny your motion."

Obviously, if the indictment is legally insufficient, these convictions must be set aside. We urge that the indictment is wholly insufficient.

In this discussion it is important to keep in mind the statutes involved and for that reason we quote therefrom:

The indictment indicates at the outset that the proceeding involved:

> "18 USCA. Section 88: (Conspiracy to violate Title 50 USCA Appendix, Sections 904a-925);" [P. R. 2].
>
> "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00 or imprisoned not more than two years, or both."
>
> "Sec. 904 (50 USCA Appendix)
>
> (a) It shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2 [section 902 of this Appendix] . . . or of any regulation, order, or requirement under . . . section 205 (f) [sections 922(b) or 925(f) of this Appendix], or to offer, solicit, attempt, or agree to do any of the foregoing . . ."

Sections 903 through 925 (except for certain portions of Section 904 and certain portions of Section 925, both of which portions are hereafter considered) are not here discussed because they have nothing whatever to do with this particular prosecution.

To assist in clarifying the argument as to the insufficiency of the indictment, we have divided the argument into five sub-divisions, viz.:

1. Defects Touching the Allegations as to the Regulations and Orders of the Price Administrator.

2. Defects Touching the Failure to Charge Any Conspiracy.

3. Improper Attempt to Charge a Felony Based on Allegations of Acts Which Constitute a Misdemeanor, if Anything.

4. Defects Touching Failure to Charge Conspiracy to Violate Any Provisions of the Emergency Price Control Act.

5. Insufficiency of Details in the Indictment to Meet the Requirements of a Criminal Charge.

These points will be discussed in the foregoing order.

1. Defects Touching the Allegations as to the Regulations and Orders of the Price Administrator.

This indictment charges that what the defendants did was "to sell and deliver, . . . (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902 (a)", etc.

The indictment specifically charges that the defendants conspired

". . . to commit offenses against the laws of the United States, to-wit, offenses in violation of United States Code, Appendix, *Sections 904 (a)—925, by*

> *wilfully selling and delivering and by wilfully offering to sell and deliver* a certain commodity, to-wit, distilled spirits (whiskey)" etc. (Emphasis Supplied.)

This indictment charges no conspiracy to violate any other sections than the specific Sections 904 (a) to 925. This is very important.

In other words, there is *no charge* that the defendants conspired to violate any of the provisions of Section 902 (a). This is likewise important.

Furthermore, although the indictment does say that defendants conspired to violate the law by wilfully selling and delivering and by wilfully offering to sell and deliver whiskey "at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations . . . duly made . . . under the provisions of 50 USCA, Section 902 (a)", there is not one word in Section 902(a) which says anything whatever about the establishment of prices under which any commodity *might be sold and delivered or offered for sale or delivery.* This may be startling but it is true none the less. The pertinent parts of Section 902(a) are as follows:

> "Section 902(a) Whenever in the judgment of the Price Administrator . . . prices of . . . commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may be regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act . . ."

Nothing is said about fixing a price or prices that cannot be exceeded in any sale or offering.

Conceding for the purposes of argument only—and that is the extent of the concession—that regulations and orders *could* have been and were promulgated under Section 902(a) by the Price Administrator fixing the maximum prices at which whiskey could be sold and delivered or offered for sale or delivery, still nothing is said in the indictment that any such *regulation* or *order* so promulgated by the Price Administrator was "accompanied by a statement of the consideration involved in the issuance of such regulation or order." Yet, Section 902(a) specifically provides:

> "*Every* regulation or order issued under the foregoing provisions of this subsection *shall* be accompanied by a statement of the considerations involved in the issuance of such regulation or order." (Emphasis Supplied.)

Surely it would require no argument nor citation of authority to establish that the allegations that the defendants conspired "to commit offenses against the laws of the United States," and that maximum prices had been "duly established by the Price Administrator" and that those prices were fixed by "regulations and orders duly made and promulgated" are mere conclusions of law and are not sufficient to raise an issue.

In *United States v. Eisenminger,* (Dist. Ct. Del.—1926) 16 Fed. (2d) 816, at 817 the court said that an

> ". . . allegation (of conspiracy) 'to violate the provisions of the Act of Congress known as the National Prohibition Act' obviously does not set forth a conspiracy to commit an offense against the United States (citations), and serves no purpose in pleading that would not be equally served by an allegation of a conspiracy to violate the federal Criminal Code."

In this indictment nothing more is added by the simple declaration that there was a violation of the regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a) by selling whiskey in excess of those prices so fixed. Particularly is this so when Section 902(a) of the Act says nothing whatever about maximum prices in connection with any sales or offer for sale of any commodity. In no event could any regulation or order, whatever it might be, promulgated under that Section, be of any binding effect at all unless it was "accompanied by a statement of the consideration involved in the issuing of such regulation or order."

To epitomize these defects, we urge that—

A. There is no charge that the defendants conspired to violate Section 902(a); the indictment specifically alleges an intention to violate 904a—925.

B. There is nothing in Section 902(a) which says anything whatever about the establishment of prices at which any commodity might be sold or delivered or offered.

C. But even conceding that such regulations and orders could have been promulgated under Section 902(a) and even conceding that the prosecution intended to charge conspiracy to violate Section 902(a) (contrary to the direct allegation that the defendants conspired to violate Sections 904(a)—925) the allegations of the indictment are insufficient because the "regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a)" [Ind.; P. R. 2] are not alleged to have been "accompanied by a state-

ment of the considerations involved in the issuance of such regulation and order," as required by Section 902(a).

This is the first point on the insufficiency of the indictment, but is by no means the strongest point.

2. Defects Touching the Failure to Charge Any Conspiracy.

A short discussion and the citation of a few authorities out of an applicable multitude will demonstrate that this indictment does not contain a charge of any conspiracy legally sufficient as against a demurrer.

We again call attention to the fact that in this indictment no continuing conspiracy is charged. The indictment merely states that "at a time and place to said Grand Jurors unknown, (the defendants) did unlawfully, wilfully, knowingly, and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code. Appendix, Sections 904a—925, by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, . . . (whiskey) at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a)" and thereafter performed certain overt acts in furtherance thereof.

The point involved here is: Does the indictment charge a *conspiracy* to commit a violation of 50 United States

Code, Appendix, or a *joint commission* of the substantive offenses denounced by 50 United States Code, Appendix?

We contend that the indictment *must* be construed as charging (except for the defects hereinafter pointed out), a *joint commission of the substantive offenses* rather than charging a *conspiracy* to violate the named sections of 50 United States Code, Appendix.

For the purpose of argument (only) we will concede that the wilful selling and delivering or the wilful offering to sell and deliver whiskey in violation of the regulations is a substantive offense. The prosecution must concede that "by wilfully selling and delivering and by wilfully offering to sell and deliver" that commodity in violation of the regulations, the defendants committed the *substantive* offense. *That is the charge made here.*

The inclusion in this indictment of the section numbers of the statutes, which it is claimed the defendants conspired to violate, "from no part of the indictment, and neither add to nor take from the legal effect of the charge." *(U. S. v. Nixon,* 235 U. S. 231, 235.) Again this is borne out in *Taylor v. United States,* 2 Fed. (2d) 444, 446 (C.C.A. 7), in which it is said:

> "The indictment is a pleading. Its sufficiency must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of section 135 of the Criminal Code or of section 1014 of the Revised Statutes of the United States (Comp. St. Section 1674) neither adds to nor detracts from the allegations which alone must measure the sufficiency of such pleading."

In *Biskind v. United States,* 281 Fed. 47 (C.C.A. 6), this language is used:

> "The sole question presented relates to the legal sufficiency of the indictment and proofs. The indictment charges a conspiracy to commit 'an offense against the United States; that is to say, to violate section 143 of the United States Criminal Code (section 10313) by rescuing and setting at liberty a person convicted of an offense and ordered committed, etc. We agree with the contention that section 143 does not apply to the facts set out in the indictment, because that section punishes only a forcible rescue, which the stated facts negative. In our opinion, however, the misreference to that section does not invalidate the indictment. It is well settled that a reference to the section relied upon by the pleader, contained in either the caption or the margin of an indictment, does not limit the prosecution to proof of a case under such statute. Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U. S. 231, 235, 35 Sup. Ct. 49, 59 L. Ed. 207. In those cases it was said that the caption or margin constitutes no part of the indictment, and neither adds to nor weakens the legal force of its averments, while in the instant case the reference to the statute is in the body of the indictment; but in our opinion the case before us is within the reason of the rule announced in the Williams and Nixon Cases."

See also *Johnson v. Biddle,* 12 Fed. (2d) 366-369, and numerous cases cited therein, and *Martin v. United States,* 99 Fed. (2d), 236, 238 (C.C.A. 10), and *Moore v. Hudaneth,* 110 Fed. (2d), 386, 388 (C.C.A. 10).

Eliminating from the body of this indictment these code references, the charge reads that the defendants conspired—

> ". . . to commit offenses against the laws of the United States, . . . by wilfully selling and delivering, and by wilfully offering to sell and deliver, a certain commodity, . . . (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders, . . ."

It will be noted that the defendants are charged with a conspiracy to commit an offense against the laws of the United States merely "by wilfully selling and delivering," etc., whiskey in violation of certain regulations; in other words, they are charged with a conspiracy by reason of the fact that they *did* wilfully sell and deliver that commodity in violation of the regulations. Such a charge is not enough. There must be a charge not only that the conspiracy was wilfully formed, *but that it was intended under the conspiracy* to violate the law *by* wilfully selling or delivering or by wilfully offering to sell or deliver, the whiskey in violation of the regulations. The doing of the act itself is not a conspiracy. The authorities for this proposition are clear.

You can have no conspiracy unless there is an intent to form a conspiracy; in other words, there must be a wilful participation in the conspiracy before any defendant could be held under such a charge. That is "Hornbook law." There can be no violation of Section 904 unless *that* violation is wilful. We quote from Section 925 (b)—

> "Any person who *wilfully* violates any provision of section 4 of this Act (section 904 of this Appendix)

* * * * * * * *

shall, upon conviction thereof, be subject to a fine of not more than $5,000.00 . . . or to imprisonment . . . for not more than one year . . . or to both such fine and imprisonment."

It is a well established rule that the crime of *conspiracy* to commit a crime may be complete without the actual commission of the substantive offense to commit which the conspiracy was formed. The crime of conspiracy is committed when the unlawful federation and agreement occurs and one overt act in furtherance thereof is consummated. That overt act need not be in itself criminal at all, much less need it be the substantive offense itself. The commission of other overt acts does not enlarge the crime of criminal conspiracy.

Surely, it will be conceded that when the *object* of the conspiracy has been achieved, the conspiracy to achieve that object is at an end; that particular crime of conspiracy is finished.

Logan v. U. S., 144 U. S. 263; 12 S. Ct. 617; 36 L. Ed., 429;

Heard v. U. S., 255 Fed. 829 (C.C.A. 8);

Leady v. U. S., 280 Fed. 864 (C.C.A. 8).

See also:

Mitchell v. U. S., 118 Fed. (2d) 653 (C.C.A. 10);

Stapp v. U. S., 120 Fed. (2d) 898 (C.C.A. 5).

In the instant case there is no charge—nor can this one be construed as charging—the conspiracy as embracing any intention to sell and deliver or to offer to sell and deliver, etc.; the charge is that the defendants formed the conspiracy *by* selling and delivering and *by* offering to

sell and deliver. There is no charge of any continuing conspiracy. When the selling and delivering or the offering to sell and deliver occurred, the substantive offense (a misdemeanor) was actually committed; *it could not be a conspiracy to commit, but a joint participation in the commission of the substantive offense.*

On the other hand, "by wilfully selling and delivering and by wilfully offering to sell and deliver," etc., the substantive offense was committed and the overt acts set out in the indictment became meaningless and of no further force as to any defendant.

No new conspiracy was formed and no new offense was committed.

3. Improper Attempt to Charge a Felony Based on Allegations of Acts Which Constitute a Misdemeanor, If Anything.

One of the vices—although not by any means the only vice—of this kind of pleading is the obvious attempt on the part of the prosecuting officials to convert a misdemeanor into a felony, by the simple expedient of charging a conspiracy punishable by a fine of not more than $10,000.00, or imprisonment of not more than two years, or both (18 U. S. C. Section 88), whereas the only crime committed here—if one was committed—was a misdemeanor through the violation of a regulation promulgated under Section 902(a), which violation under Section 925(b) is punishable by a fine of not more than $5,000.00 or imprisonment of not more than one year, or both. This practice has been condemned in no uncertain terms.

We quote from *United States v. Kissel, et al,* (C.C.A., N. Y.) 173 Fed. 823, and which case has been favorably cited in *Heike v. United States,* 227 U. S. 131; 57 L. Ed. 450, 455—

> "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions . . . now habitually take the form of indictments for conspiracies to commit crimes, the actual commisison of which is also usually alleged in the indictment. *Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded.* But there is no mysterious potency in the word 'conspiracy'. *If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy.* The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime." (Emphasis Supplied.)

The following forceful language is from the opinion in *United States v. Eisenminger,* 16 Fed. (2d) 816, 821—

> "I think that the rules of pleading in conspiracy cases should not be further relaxed to the prejudice

of those accused, regardless of their guilt. It has in fact been long considered that there is in this country a tendency to extend the doctrine of conspiracy and ulitize it for the indictment of persons suspected of crime of which there is difficulty of obtaining sufficient proof. Bouv. Dict. 'Conspiracy'."

In January of 1903, F. P. Blair, Esq., said in 37 Am. Law Rev. 33, under the title 'The Judge-Made Law of Conspiracy,' that 'it has become in recent years quite the fashion in this country, where two or more are suspected of some crime, for public prosecutors to have them indicted for conspiracy. The courts have made it delightfully easy to secure a conviction ,by relaxing the rules of pleading and enlarging the scope of testimony. Thus a great mass of decisions has accumulated, each court apparently vying with all the others to make new law, until now almost any sort of an agreement may be styled a conspiracy; any indictment containing the magic words 'combined and conspired subtlely and craftily' makes a good indictment, and any * * * evidence will prove the crime. * * *'

So widely has been the extension of the doctrine since those words were written that at the Judicial Conference held in 1925 under the Act of September 14, 1922 (42 Stat. 837), the Chief Justice of the United States and the Senior Circuit Judges made, in their Recommendations to the District Judges, this statement:

'We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony, and we express our conviction that, both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

'Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; *yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for co-operative law breaking.* We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant'." (Emphasis ours.)

These last quoted passages are used with strong approval, by Mr. Justice Butler, of the Supreme Court, sitting as a Circuit Justice, in *United States v. Motlow,* 10 Fed. (2d) 657, 662.

In our opinion, therefore, this indictment cannot be held to charge a conspiracy; its nearest approach to charging *any* crime is to charging a joint commission of a substantive offense under Section 925(a).

4. Defects Touching Failure to Charge Conspiracy to Violate Any Provisions of the Emergency Price Control Act.

There is no charge that the defendants ever wilfully conspired to violate *wilfully* provisions of Section 925(b) of the Appendix. This is a crime created by statute and not a common law crime. There is *no* violation unless the

acts are *wilful* because the statute makes wilfulness a necessary ingredient of the offense.

> "Indictments for offenses created and defined by statute must in all cases follow the words of the statute." *United States v. Cruikshank,* 292 U. S. 542, 558, 23 L. Ed. 588.
>
> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States v. Hess,* 124 U. S. 486, 31 L. Ed. 516. And in *Britton v. United States,* 108 U. S. 199, 27 L. Ed. 698, it was held, in an indictment for conspiracy under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy." *Pettibone v. United States,* 148 U. S. 197, 37 L. Ed. 419, 422.

To make this point clear, we suggest that if it had been charged that the defendants

> "did unlawfully, wilfully, knowingly and feloniously conspire . . . to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50, United States Code, Appendix, Sections 904a-925, by intending to wilfully sell and deliver and by intending to wilfully offer to sell and deliver,"

whiskey at excessive prices, the charge of conspiracy would be sufficient except for the other defects pointed out in 5 *infra.*

Under Section 925(b), it is only a person "who *wilfully* violates any provisions of Section 904" that is guilty; in a mail fraud case it is only a person who uses the mails in furtherance of a scheme to defraud that is guilty. A person to be guilty of conspiracy to violate the mail from fraud statute must not only intend to form the scheme to defraud, but must intend to use the mails in connection with the perpetration of that fraud; so likewise a person to be guilty of a conspiracy to violate Section 925(b) must embrace in the conspiracy an intent to violate *wilfully* the provisions of Section 904.

In *Morris v. United States,* 7 Fed. 785 (C.C.A. 8), defendants were charged under Counts 1 to 18 with mail fraud violations and under Count 19 with a conspiracy to commit mail fraud.

The Court said:

> "The government carries a heavier burden where it seeks a conviction under section 37 for a conspiracy to violate section 215 than where it merely seeks conviction for the violation of said section 215 because it must prove an intent on the part of the conspirator to use the mails in carrying out the scheme . . .
>
> "It was not essential to convict under any one of the eighteen counts that an intent to use the mails as a part of a scheme to defraud be shown. To warrant conviction under the nineteenth count, the intent to use the mails must be proved."

5. Insufficiency of Details in the Indictment to Meet the Requirements of a Criminal Charge.

Probably the citation of one authority and quotations therefrom will settle this point. In *Pettibone v. United States,* 148 U. S. 197, 37 L. Ed. 419, the indictment sets out in considerable detail the fact that certain litigation was pending in United States District Court in Idaho and describes a series of acts done by the defendants and then alleges:

> " 'And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say that the said' defendants (naming them) . . . 'did, on the 11th day of July, 1892, unlawfully, wilfully, fraudulently, and feloniously, conspire, combine, confederate, and agree together to commit an offense against the United States, to-wit, to corruptly and by force and threats obstruct and impede the due administration of justice in the aforesaid United States Circuit Court for the Ninth Judicial Circuit, District of Idaho.' "

Certain overt acts were alleged. Motions to quash and demurrers were filed and overruled and after verdict of guilty, motions in arrest of judgment were made and denied, and an appeal was taken to the Supreme Court of the United States.

The Supreme Court pointed out that there are two kinds of conspiracies which are punishable in the courts of the United States:

First, where by concerted action, the defendants sought to accomplish a criminal or unlawful purpose, and second, where the conspiracy had a purpose not in itself criminal or unlawful, but where the object was to accomplish it by criminal or unlawful means.

The Court then continues—

> ". . . when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.
>
> "This indictment does not in terms aver that it was the *purpose of the conspiracy* to violate the injunction referred to, or to impede or obstruct the due administration of justice in the crcuit court; but it states, as a legal conclusion from the previous allegations, that the defendants *conspired* so to obstruct and impede . . . but the indictment nowhere made the direct charge *that the purpose of the conspiracy was to violate the injunction, or to interfere with proceedings in the circuit court.*" (Emphasis suppplied.)

In this indictment not one word is said as to the "purpose of the conspiracy" that even approaches for clarity and definiteness the above quoted language taken from the *Pettibone* indictment. Yet, the Supreme Court in the *Pettibone* case said that the judgment should have been arrested and the indictment quashed, and in quoting from *United States v. Carll,* 105 U. S. 611, 26 L. Ed. 1135, says:

> " 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light

> of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' "

What these regulations and orders of the Price Administrator actually provide "cannot be supplied by intendment or implication"; the specific violation charged against these defendants

> "must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." (*Pettibone v. United States, supra.*)

This very type of pleading has been criticized by this very court in *Corson v. United States* (C. C. A. 9—1944) 147 Fed. (2d) 437. In that case it was charged that the defendant

> "did knowingly, wilfully, and unlawfully assign and transfer . . . 800 . . . gasoline ration coupons in a manner other than in accordance with the provisions of Ration Order 5C . . ."

He was convicted and appealed. The case was reversed on failure of the court to properly instruct the jury, but this court said at page 428—

> "However, we pause to comment upon the poor draftsmanship of the formal accusatory document before us. Good pleading would unmistakenly inform the accused as to the law he is alleged to have violated, and the information in this case does not come

up to this standard. After a careful study of the information, and, in fact, after a study of every page of the record and of the briefs, we have yet to learn what inhibition in the law the defendant is accused of having violated."

In this case at bar, the defendants are charged with a conspiracy to commit offenses in violation of Title 50, United States Code, Appendix ". . . by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator," etc. What those maximum prices were, it is not alleged; apparently Mr. Nathanson, a prosecution witness, who described himself "as a price specialist in the San Francisco District Office of the Price Administration, (and) as such familiar with the manner and method of arriving at the ceiling prices on various commodities such as whiskey" [P. R. 78], did not know. Mr. Nathanson said that "these prices for whiskey are governed under the provisions of the Maximum Price Regulation 445 as amended, and the price at the wholesaler's level is fixed at the place of business of the wholesaler under the applicable regulation" [P. R. 78]. And further, that "the ceiling price on a particular brand of whiskey is not published in any bulletin issued by OPA, but is fixed by the application of certain rules to the manufacturer's cost, and if anyone were to determine the ceiling price of this liquor that knowledge would have to come from the wholesaler's record" [P. R. 79]. In desperation, the attorney for the prosecution asked this question:

"Q. Well, the OPA regulation, then, sets up a formula and the different costs and other factors are

> applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer?"

and received the reply—

> "Correct."

If an indictment does not allege what the maximum prices so "duly established" were, and if "a price specialist in the . . . Office of the Price Administration" does not know, and if those maximum prices can only be determined by a formula embracing factors "applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer," how can it be said that these defendants knew or had any means of knowing the charge levied against them?

> "The indictment against an innocent defendant, being what every indictment is presumed to be, must, to be adequate, be in distinct and full terms, so plain as to preclude the necessity of guessing at the meaning. Men differ as to their capacity of comprehension, so that justly the law never punishes one for inability to comprehend a meaning not set down in exact words. 2 Bishop New Criminal Procedure, Paragraph 518." *Montana v. U. S.*, 262 Fed. 283, 288.

In a case arising in the District of Columbia (*U. S. v. Johnson,* 26 App. D. C. 136) where the question was raised by a motion in arrest of judgment as to the sufficiency of certain allegations of falsity, the court said:

> "Counsel for appellant (Government) admits that it is only by implication that the indictment charges

that the recited answer was in fact false, and adds that 'although the charge is indirect and inferential' the effect is sufficiently clear as to be unmistakable to the ordinary intelligence. We think that it would be an unsafe rule to lay down that an indictment is good or bad according to the degree of intelligence of the indicted person or his attorney."

The defendants have at all times preserved for decision by this court the error committed by the trial court in ruling on the sufficiency of the indictment. Demurrer to the indictment was filed [P. R. 5] and overruled [P. R. 7]. Objection was made to the introduction of any evidence under the indictment on the ground that it does not state an offense [P. R. 77], and that objection was overruled [P. R. 78]; a motion was made at the close of the prosecution's case in chief to acquit all of the defendants on the ground, among others, that the indictment does not state facts sufficient to constitute a public offense, or any offense punishable by the laws or the constitution of the United States [P. R. 267] and the motion was denied; a similar motion was made at the close of the entire case [P. R. 311] and denied [P. R. 313]; and a motion was made to require the prosecution to elect on which of the overt acts set out in the indictment it would rely for a conviction in the case [P. R. 313] and the motion was denied [P. R. 314]; a motion for arrest of judgment was made [P. R. 11, 315] and denied [P. R. 317].

POINT TWO.

The Improper Admission of Evidence.

Under this heading we propose to discuss the Assignment of Errors VII to XV, inclusive [P. R. 54-71], reading as follows:

"VII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Steve Vincentini, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objections and the exceptions were as follows:

I had a discussion with him (Malaby) about whiskey.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to object, your Honor, on the ground it is incompetent, irrelevant and immaterial. * * *

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. * * *

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. * * *

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand the objection heretofore made to hearsay testimony applies also to any conversation which this witness may

have had with the defendants Files and *and* Shaeffer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling.

* * * * * * * *

Q. At the time you had your conversation with Mr. Files and Mr. Schaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by the conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled.

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants.

VIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, William S. Johnson, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was said by him? (Rocco.)

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up—

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

The Court: Yes.

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Charles Ferrati, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purpose (purchase) of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. Do you recall what you said to Mr. Rocco and what he said to you? A. When Mr. Johnson was finished he called me over there—

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no

value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

The Court: Yes. Objection overruled.

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Enrico Barrotti, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please—

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling.

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show.

XI.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Frank Spenger, concerning certain conversations had with per-

sons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court may not understand the force of my objection.

The Court: I think under the new rules even an exception need not be taken.

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Martin Fushslin, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the

negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was your conversation with Mr. McKinnon?

* * * * * * * *

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out.

(Witness continuing):

We were talking about the whiskey shortage and he said he knew where we could get some at about $57 a case including everything.

Q. * * * Was there any discussion at that time about the ceiling price or OPA price? A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price? A. Yes.

Mr. Cannon: I move to strike it out as immaterial.

Mr. Licking: If he knew it merely of his own knowledge,—if he knew if (it) from the conversation.

Mr. Cannon: I move it to be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became *pro tanto* a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whiskey became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception.

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Guy Caputa, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The

grounds of the objections and the exceptions were as follows:

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well.

Mr. Cannon: Exception to your Honor's ruling.

* * * * * * * *

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well.

XIV.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and in admitting in evidence the following exhibits, identified by various witnesses, produced by

the prosecution. The said exhibits being as follows:

Government's exhibits 1; 2; 3-A; 3-B; 3-C; 4; 4-A; 4-B; 5; 6; 6-A; 7; 7-A; 7-B; 8; 8-A; 9; 9-A; 10; 10-A; 11; 12; 12-A; 12-B; 13; 13-A; 13-B; 13-C; 14; 14-A; 14-B; 14-C; 15; 16; 16-A; 17; 18; 18-A; 18-B; 19; 19-A; 20; 20-A; 20-B; 21; 22; 22-A; 23; 25; 25-A; 26; 26-A; 26-B; 26-C; 27; 28; 29; 30.

The grounds of the objections and the exceptions were as follows:

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. * * *

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Goverment's Exhibit 3-A for Identification, consisting of certified check debit, receipt

signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for $2100 dated April 20, 1944 also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaffer, defendant Files and defendant Shaffer, dated June 21, 1944, agreeing to pay $3,668 to Steve Vincentini.

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary these invoices show that these goods were sold at the ceiling price and nothing more. I make that general objection. I am going to make an objection to all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defendants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we take in the matter. Counsel yesterday sought to establish—

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged ln the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

XV.

Said District Court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the Court being as follows:

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whiskey, that there was nobody present but himself and Mr. Malaby, and the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the motion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in this room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness.

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception.

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced bearing upon a transaction subsequent to April 24, 1944, and make

the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

* * * * * * * *

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documental, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; upon the same ground as to the witness Caputa; upon the same ground as to the witness Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the

same ground as to any testimony in reference to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exceptions."

These Assignments of Errors are illustrative of the hearsay nature of the testimony offered and received, over objections, against these defendants. To have set out as separate Assignments of Errors similar testimony received from the lips of other prosecution witnesses would have prolonged to unreasonable proportions the Assignment of Errors and this brief.

Reading of the testimony given by the witnesses mentioned in Assignment of Errors VII to XIII, viz.:

Steven Vincentini [P. R. 86-92];

William S. Johnson [P. R. 97-98];

Charles Ferretti [P. R. 100-101];

Enrico Barrotti [P. R. 102-103];

Frank Spenger [P. R. 104-110];

Martin Fuchslin [P. R. 103, 110-116];

Guy Caputa [P. R. 118-121]

clearly shows that the testimony was very largely hearsay as to these appellants; was highly prejudicial to their rights, and, its admission in evidence could not be construed as being harmless error.

Vincentini testified that from some man then in France he obtained a card bearing Malaby's address and that this man told him to go there and he could buy whiskey from Malaby; that he saw Malaby at his apartment and discussed the price and the amount and had completed

the deal with Malaby when he left the apartment and deposited the $2,100.00, at which time Malaby, Files and Shaffer were there; that he paid the money in cash and said "this is supposed to be for some whiskey deal. I want you to keep the money for this boy for 60 days"; that he gave the money to Files and he wrote out a receipt; that he had the order for the whiskey when he went to the office of Mr. Files, but he gave Mr. Files the money. That Malaby also gave him a receipt and that both receipts were given to him in Mr. Files' office [P. R. 92].

William S. Johnson testified that Rocco was the only one of the defendants that he had ever met, and that he negotiated with Rocco for the purchase of some whiskey, and Rocco told him he wanted a deposit down and the balance would have to be paid by a certified check, and that he would receive an invoice "covering the balance, but the first money I would have to give him in cash" [P. R. 98]. He did not know what the ceiling price of the whiskey was.

Charles Ferretti testified that he knew Primo Rocco and made arrangements with him to buy some whiskey at $50.00 a case and that Rocco then told the witness that he would have to pay the balance when the liquor came, but would have to give him at that time $500.00; that there was no discussion as to the OPA ceiling price; that later he met a man that he thought was Malaby who wanted him to sign a release on a whiskey warehouse receipt [P. R. 100-101].

Enrico Barrotti testified that he met Rocco who asked him if he wanted some whiskey and that Rocco was with a man named Burnett; that Rocco said he had had a carload come in and he would like to sell about 100 cases

more or less, and "I contracted for 200 cases and paid Rocco down $4220.00, and he gave me a receipt for it, but later I refused to take the whiskey" [P. R. 102-103].

Frank Spenger testified that he first met Malaby through a Mr. Benson and that Benson remained outside of his place while Malaby and Spenger talked together; Malaby gave him a taste of whiskey which he proposed to sell him at $60.00 a case for the blended and $70.00 a case for the bonded; that he ordered 500 cases; that he gave a certified check for $1809.50 to Malaby with whom he discussed how the over the ceiling price was to be paid and they decided to go to San Francisco and put it in escrow for 90 days until the whiskey was delivered; that they went to Mr. Files' office in San Francisco and Shaffer walked in there after the deal was over [P. R. 106] and "I drew my check" for the amount that he (the witness) and Malaby had figured out before they went to Files' office, and that "there was no discussion at all in Files' office as to the transaction that Malaby and I had made" [P. R. 106]; that he had already had his conversation with Malaby and the money was put up in Files' office as security to pay for the liquor, and very little was said to Files; that Files did not talk much about it; that later 50 cases of the blended whiskey was delivered and that he started to use it but had so many kicks on it that he stopped serving it, and later the Pure Food Department came along and condemned it all and he left it in the warehouse but later they came and took it away and sent it back to the National Import Company [P. R. 107]; that the check he made out and signed in Mr. Files' office was for $13,736.00; that thereafter Malaby came to his place eight or nine times and the day the order was written up Mr. Newman was with him, but

there was no discussion about any overage. The only discussion that was ever had with Newman was concerning the ceiling price and not about any overage [P. R. 109]; that at the time he was in Mr. Files' office, he (the witness) brought up the subject himself and said, "What can I say this money is for, for my books?", and that he wanted to know if he could not put it down as a deposit on an apartment house or something [P. R. 109].

The witness Martin Fuchslin testified of his dealings with one John McKinnon, stating that about two weeks after he met him, he turned over some money in escrow, but at that time he had not signed any papers, but that Mr. Newman had torn up a receipt that he received. When Newman stood up he said that that was not the man and he identified Mr. Shaffer as being the man who tore up the receipt [P. R. 111]; that in his conversation with McKinnon they were talking about the whiskey shortage and he told the witness that some could be had at $57.00 a case, which the witness knew was over the ceiling price, and that McKinnon had told him that he was to pay down so much, something about $1,000.00 in escrow and the rest when the whiskey was obtained; that he met Mr. Files in a real estate office on Kearney Street and went there himself while McKinnon waited outside for him; that McKinnon had told him to ask for Mr. Files, who made out the receipt, which was given to him for $1,200.00; that he did not meet anybody again until he paid the $1,800.00 at which time he signed some documents; that the witness pointed out Mr. Files as being Mr. Malaby and then he identified Mr. Lowenthal as Mr. Malaby [P. R. 115-116].

The witness Guy Caputa testified that Malaby came alone to see him the first time and later he paid over

some money to Malaby, who had told him what the price would be for the whiskey; that no one was present when he first talked to Malaby; that after he had first given him some money Malaby came back again and raised it; that the witness then told Malaby he wanted his money back because he did not like the deal but he agreed to buy 500 cases and signed an order for it; that when he first talked to Malaby, Malaby told him he would have to pay the ceiling price of $36.00 plus some more that he got the receipt for 500 cases of McHenry Reserve whiskey showing that the price was to be $18,200.00 with a notation, "No cash down," and he got the receipt when he gave the money to Mr. Files on Kearney Street; that he went there alone; that Malaby had told him to go there and deposit the money, and that before that he had not seen Newman but saw him in the office of Mr. Files when he got the receipt on March 27th [P. R. 120]; that at that time there were no discussions, but that he just paid over the money because Malaby had said that Files was a nice man and he guaranteed to pay the money; that he paid over $12,000.00 to Files, who did not say a word but gave him a receipt; that Malaby and Newman came to his place of business after that and at that time he told them he wanted his money back and they said that the next month they would give him $5,000.00, which they did in two installments of $2500.00 each, which money was paid back by Mr. Files [P. R. 121].

It seems to us it would serve no useful purpose to go over the testimony given by witness after witness who claimed to have purchased whiskey at over-the-ceiling prices. If the testimony of those witnesses is to be believed, it is clear that high-handed methods were used in some instances to get these witnesses to buy whiskey

in the "black market." However, the testimony given by these witnesses was in each instance to a very large degree hearsay as to all or as to most of the defendants, *unless* that testimony is construed as evidence of acts by a conspirator committed at the time of the existence and in furtherance of the conspiracy alleged. Many of the witnesses who purchased this liquor dealt only with Malaby or Rocco or Burnett, or with someone else, but in some instances their dealings and conversations were with more than one defendant. But even though the conversations had to do with the purchase of liquor, at over-the-ceiling prices, and even though those conversations may have been held with one person or with more than one person, those facts alone would not make those conversations admissible as against the other defendants.

The language used by the Court in *People v. Rodriquez,* 37 Cal. App. (2d) 290, is apt at this point. In the *Rodriquez* case the defendants were charged "with the crime of conspiracy to commit robbery."

> "It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely

charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally."

In the face of the dilemma with which it was confronted and when objections were made time and again that the testimony offered and received was hearsay as to the defendants on trial, the prosecution was able to get the testimony of all of the liquor purchasers in evidence *by asserting that those purchasers themselves were conspirators.*

At one stage of the proceedings, the defendant Martin Fushslin was asked concerning *his* knowledge as to whether or not he was buying at over the ceiling price. Objection was made to that testimony and the following occurred:

"The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became *pro tanto* a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whiskey became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser" [P. R. 112].

On such a novel theory, any and every thing which anyone of these purchasers of whiskey might have said between themselves in the utter absence of all of the defendants, but relating to the purchase and sale of whiskey at over-the-ceiling prices would be admissible against these indicted defendants! The mere statement of the proposition demonstrates its untenability. If these purchasers were in fact conspirators, the indictment should have so alleged; the grand jurors must have known some of them because they actually named James Gibson, Elliott R. Smith, Martin Fushslin, Robert C. Thomas, and Frank Spenger, in the alleged overt acts; those men could not have been the conspirators described in the indictment as "divers other persons to said Grand Jurors unknown" [Rep. Tr. 2].

Proper motions to strike this hearsay evidence were made at the close of the government's case in chief [P. R. 262-267], and were denied by the trial court [P. R. 267]; those motions were renewed and again made at the close of the entire case [P. R. 310-311], and such motions to strike were denied by the trial court [P. R. 311].

POINT THREE.

Error of the Court in Refusing to Acquit the Defendants Upon Their Motions Made at the Close of the Government's Case in Chief, and Also Made at the Close of the Entire Case. The Entire Evidence Was Insufficient to Justify or to Sustain the Conviction of These Defendants or of Either of Them.

Under this heading we propose to discuss the Assignment of Errors II [P. R. 51], and part of XVI [P. R. 71] reading—

II.

"Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman, W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment." [P. R. 51-52.]

"XVI.

Mr. Cannon: * * * At this time, if the Court please, . . . I move the Court to dismiss the indictment as to each defendant and to acquit each defendant . . . on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged.

* * * * * * * *

The Court: —it is clearly the duty of the Court to deny your motion.

Mr. Gillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of such defendant jointly and severally to the denial of the motion." [P. R. 71-72].

We realize that if the indictment is good as a pleading and if there is any substantial evidence, properly before the trial court, upon which the conviction of these defendants could be sustained, this court will not set aside those convictions. However, we respectfully urge that there is no substantial, properly admitted, evidence in this record to sustain the convictions of these defendants or of either of them.

It will be borne in mind that Mr. Newman rested his case at the conclusion of the Government's case in chief [P. R. 268].

It is stipulated and the trial court made the order that the "Bill of Exceptions contains all of the evidence submitted to the trial court, except certain exhibits offered and received in evidence, but which said last mentioned exhibits are, under stipulation of counsel, epitomized in said Bill of Exceptions, and the originals of which are transmitted to the Appellate Court" [P. R. 319].

About thirty-four witnesses were produced by the prosecution. Nearly all of them were buyers of whiskey through Malaby or through men whom Malaby had employed without the knowledge, consent or authorization of Mr. Cain. Only the witnesses Malaby, Cardinelli, Benson, Pitta and Goldstein even mentioned Cain; only the witnesses Malaby, Vincentini, Gabrielli, Spenger, Fuchslin, Caputa, Thomason, Nomellini, Benson, McKin-

non, Pitta, Goldstein and Williams even mentioned Files; and only the witnesses Malaby, Lichtenberg, Spenger, Fuchslin, Figone, Caputa, McNeil, Smith, Cardinelli, de Georgis, Bryden, Nomellini, Benson, de Silva, Costa, Burnett, Goldstein and Williams even mentioned Newman. Many of these witnesses did little more than mention the names of these respective defendants. We believe a fair statement of the testimony of each of these witnesses as they effect each of these appellants is as follows:

As to the witnesses who mentioned Mr. Cain:

Jack Cardinelli [P. R. 132-135].

The prosecution voluntarily limited this testimony and offered it "against the defendant Cain and the defendants Newman and Malaby" only [P. R. 134]. Cardinelli testified that he had previously met Malaby and then went to Malaby's room in the Palace Hotel where he met Newman and Cain. This was his first meeting with them. Newman was making out *invoices* on the typewriter and Cardinelli said he got an invoice that day [P. R. 133]. Newman was getting his information from Malaby to make out the invoices and Cain was lying on the bed, and Newman asked Malaby, "How about the overage?" and Malaby said, "Yes, I have got it" [P. R. 134]. Later the witness testified that he never did receive any invoice [P. R. 134], but he did get an order blank that was not signed by anybody and that Malaby had written it up; that he talked very little to Cain and said merely "How do you do" [P. R. 135].

Although Mr. Cain flatly denied any such conversation and denied being present at any such time as Cardinelli relates [P. R. 275] the testimony itself as given

by Mr. Cardinelli hardly seems credible. In the first place, Cardinelli said he had already given Malaby $6,000.00 at the Sutter Hotel, and that while he went to the Palace Hotel to get the invoice, he never did get an invoice, and apparently out of the "clear sky" Newman asked Malaby if he had gotten the overage, all of the while no conversation going on between Cain and Cardinelli or with anyone else, and Cardinelli merely asking Cain "How do you do?"; there was no talk about any liquor [P. R. 135].

Malaby undertook to corroborate this testimony of Cardinelli [P. R. 204] but Malaby is a convicted felon [P. R. 184] and pleaded guilty to being a conspirator in the present case [P. R. 183]. According to the statement of the prosecuting attorney, Mr. Cardinelli is likewise a conspirator in the instant case [P. R. 112]. Such testimony ought not to be believed, even if it be said that the conversation was incriminating, a fact we do not concede.

The witness William H. Benson testified that he knew Mr. Cain. That is all of the testimony that he gave as to Mr. Cain [P. R. 147].

The witness Amaro Pitta testified that Shaffer and Malaby "were supposed to turn this money over to Cain when I got delivery of my 100 cases of whiskey" [P. R. 157]. There is absolutely nothing in the record to indicate the source of Mr. Pitta's evidence in that regard. There is nothing to show that Mr. Cain had anything whatever to do with this witness.

The witness Goldstein testified that he did not meet Mr. Cain personally until January, 1945, in Goldstein's attorney's office [P. R. 171]; that after he had gotten back his $4,000.00 from Malaby [P. R. 172], which

was after June 5, 1944 [P. R. 170], he talked with Mr. Cain on the telephone and demanded from Cain "the money back on the whiskey that had been condemned; the ceiling price" [P. R. 172].

Certainly there is nothing in the testimony of Mr. Benson, Mr. Pitta or Mr. Goldstein which could in any way incriminate Mr. Cain.

As to the witnesses who mentioned Mr. Files:

We have already fully digested the testimony of the witnesses Steve Vincentini, Frank Spenger, Martin Fuchslin, Guy Cupata (pages 47 to 51, *supra*) touching all defendants including Mr. Files and Mr. Newman.

Of the other witnesses who mentioned Mr. Files, the record will bear out that Mr. Gabrielli testified he had never seen Mr. Files until 59 days after the deal had been made for the liquor, when he went to Mr. File's office to get the money which his friend Vincentini had deposited [P. R. 94]. Mr. Files actions, as testified to by Mr. Gabrielli were surely, not incriminatory.

Mr. Thomason said he went to Mr. Files' office and there met Malaby but that he did not know whether or nor Mr. Files was there [P. R. 122].

Mr. Nomellini testified he paid $1800.00 to Mr. Malaby at Mr. Files' office, but did not remember with whom he talked, although Mr. Files and Mr. Newman were there where they could hear the conversation; that he got a receipt for the money but does not know who signed it [P. R. 145-6].

Mr. Bensen said he went to Files' office on several occasions in connection with the Spenger transactions; that after the deal had been made between Spenger and Malaby for the whiskey, he asked Files if he had cashed

Spengers' check. Files said he had turned the check over to Malaby; that he, Files and Spenger later talked trying to work out something for the protection of Spengers' money and that Files was willing to cooperate and do everything he could to protect Spengers' money [P. R. 148-9].

The witness McKinnon said Malaby introduced him and Lowenthal to Files and Shaffer, but nothing was discussed then and nothing was ever said in Mr. Files' office about ceiling price, but Malaby had previously told him and Lowenthal that the money for the whiskey was *supposed* to be deposited in Files' office; that he had told Fuchslin to go to Files' office but he did not see whether Files or Shaeffer gave Fuchslin a receipt or any money [P. R. 150-154].

Mr. Pitta testified that he paid some money to Shaeffer in Mr. Files' office and got a receipt signed in Files name although Files was not there; Shaffer filled in the receipt and gave it to him when he gave Shaffer the money. Finally he got Shaffer and Files to give him a note for the money he had paid Shaffer [P. R. 156-8].

Gus Goldstein said he deposited $4400.00 in Mr. Files' office and got Files' receipt for it but that there was no conversation in the presence of Shaffer and Files relative to the transaction, and that Files was instructed to hold the money until he released it at a later date, which the witness did [P. R. 168-9].

Lester G. Williams said that he made a whiskey deal with the two Newmans and Malaby and that later he went to Files' office to complete an escrow that they had talked of and that Files wrote out the terms "that the money would be returned to me in ninety days if the whiskey had not been delivered at that time"; that

on the ninetieth day he demanded his money back and got it within a few days, part through Malaby and the rest through Newman at Files' office [P. R. 175-6].

We respectfully submit that the evidence adduced from these witnesses is far short of enough to sustain a conviction of Mr. Files.

The testimony against Mr. Newman is more extensive than that against Mr. Cain or Mr. Files. A number of witnesses testified to having met Mr. Newman, either alone or in company with other defendants. However, many of the witnesses who identified Mr. Newman knew him only in connection with his collection of the regular invoice prices for the whiskey sold and in no instance was the invoice price or the price on the order form of International Import Company in excess of the ceiling price.

The testimony given by Mr. Malaby as to all of these defendants is obviously very damaging. It has all of the qualities which one might expect to find in the story of a twice confessed felon who seeks to gain immunity, or great clemency, by turning on those who by his own words were formerly his friends. In many respects, that testimony bears marks of high improbability but there is enough truth intermixed to make it difficult, if not impossible, to demonstrate the falsity of the most incriminating part of that evidence. While the Federal rule does not require corroboration of the testimony of an accomplice before a conviction may be had on that testimony, the Federal rule does require that such testimony shall be carefully scrutinized and accepted with great caution.

It is not unlikely that the large amounts of money involved in these sales and the commodity sold should react

unfavorably to these defendants. The fact that the prosecution witnesses were persons who freely and almost universally admitted that they, themselves, knew they were committing a crime in buying these goods, and that they sought the goods from any and every source might easily have reacted unfavorably towards these men, because they were in bad company.

Conclusion.

It is, therefore, respectfully submitted that these convictions, and each of them, should be set aside,

First, because the indictment is fatally defective in substance and in form;

Second, because the trial was based on the commission of one or more substantive offenses and not on a conspiracy to violate the law;

Third, because the prosecution has sought to change a misdemeanor into a felony by the simple expedient of pleading;

Fourth, because the improper admission of evidence resulted in an improper finding of guilt; and

Fifth, because without the improperly admitted evidence, there is not sufficient evidence in the record to support a verdict of guilt.

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